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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Donald S. Owens, Stephen L. Borrello, and Cynthia Diane Stephens

POWER PLAY INTERNATIONAL, INC., and GORDON HOWE,

Plaintiffs-Appellees,

v

DEL REDDY, AARON HOWARD, MICHAEL REDDY and IMMORTAL INVESTMENTS, L.L.C.,

Defendants-Appellants,

and

AARON HOWARD, MICHAEL REDDY and IMMORTAL INVESTMENTS, L.L.C.,

Defendants/Counter-Plaintiffs-Appellants,

v

POWER PLAY INTERNATIONAL, INC., and GORDON HOWE,

Plaintiffs/Counter-Defendants-Appellees.

Supreme Court No. _____

Court of Appeals No. 325805

Lower Court No. 11-123508-CK

_____/

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Dated: August 29, 2016

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants Del Reddy, Aaron Howard, Michael Reddy, and Immortal Investments, L.L.C. ("Defendants") seek leave to appeal from the July 26, 2016 Opinion of the Court of Appeals. (Ex. 1.) The Court of Appeals' opinion affirmed, in all respects, a September 25, 2014 Judgment entered in favor of Plaintiffs-Appellees Power Play International, Inc. and Gordon Howe ("Plaintiffs"), following a jury trial. This Supreme Court has jurisdiction to consider this Application under MCR 7.303(B). The Application is timely as it has been filed within 42 days of the Court of Appeals' decision. MCR 7.305(C)(2)(a).

This Court's review is warranted because the Court of Appeals' treatment of the issues related to Howard Baldwin – the critical damages witness proffered by Plaintiffs-Appellees Power Play International, Inc. and Gordon Howe ("Plaintiffs") – was contrary to the record, the rules of evidence, and precedent. Discovery revealed that Mr. Baldwin (1) lacked a proper factual basis for his testimony, (2) lacked the necessary qualifications pursuant to MRE 702 to testify as a valuation expert, and (3) was going to confuse the jury with irrelevant testimony regarding a vague "movie deal" that he supposedly had or was going to have with the Plaintiffs. (10/3/12 trans, pp 23-28; 3/13/13 trans, pp 6-7.) Defendants repeatedly moved to exclude Mr. Baldwin's testimony on these grounds, but to no avail.

At trial, Mr. Baldwin proceeded to offer a number of opinions which were at odds with certain admissions he made at his deposition. Defendants' counsel sought to impeach Mr. Baldwin with his deposition transcripts (6/14/13 trans, pp 100-101), but the lower court denied Defendants' counsel the opportunity to do so. (Id.; 1/14/15 trans, pp 5-6.) In so doing, the lower court deprived Defendants of one of the fundamental tools for "testing the veracity" of

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the Plaintiffs' narrative,[1] without any explanation. This error – which compounded the trial court's earlier error of letting Mr. Baldwin testify as an expert at all – opened the door for a star-struck[2] jury to enter a verdict that was grossly disproportional to the proffered proofs regarding damages. The appellate panel swept these errors under the rug through a combination of re-characterizing Mr. Baldwin as a lay witness and cursorily invoking the "harmless error" doctrine. *Power Play Int'l v Del Reddy, et al.,* unpublished opinion per curiam of the Court of Appeals, issued July 26, 2016 (Docket No. 325805), pp 9 n 3, 10 n 4 (Ex. 1).

The jurisprudential significance of these errors lies in the centrality of expert witnesses to modern litigation, and importance of ensuring that expert testimony is reliable. See *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 782; 685 NW2d 391 (2004). The trial court has a "gatekeeper role" which "applies to all stages" of litigation. *Id.* This responsibility is not limited to "scientific" opinions. See *U.S. v An Easement & Right-of-way in Madison Cty, Alabama,* 140 F Supp 3d 1218, 1240 (ND Ala 2015); *Powell v Tosh,* 942 F Supp 2d 678, 687 (WD Ky 2013); *Edge Grp WAICCS LLC v Sapir Grp LLC,* 705 F Supp 2d 304, 316 (SDNY 2010).[3] Courts cannot be allowed to abdicate this responsibility simply by calling someone a lay witness, contrary to the arguments of both parties.

---

[1] See *Int'l Union, UAW v Dorsey*, 273 Mich App 26, 30; 730 NW2d 17 (2006). This ruling ran contrary to well established law that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975,* 478 Mich 444, 477; 734 NW2d 489 (2007) (Markman, J., dissenting).

[2] Although he did not testify and may not have even been aware of the suit until the eve of trial (5/15/13 trans, pp 5-6), hockey Hall of Famer Gordie Howe – whose career was defined a half-hour's drive down I-75 from the Oakland County Circuit Courthouse – remained on the caption throughout. Also, the pseudo-celebrity status of Mr. Baldwin – a self-described "film producer" from Los Angeles who claimed several Hollywood film credits and, during his expert testimony about damages, referenced working with Jamie Foxx (6/14/13 trans, pp 39–43) – was touted throughout the trial.

[3] Federal decisions are instructive in this regard because they apply the U.S. Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579, 589; 113 S Ct 2786 (1993), and this Court adopted the *Daubert* framework in *Gilbert.* 470 Mich at 779-781.

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Nor should "harmless error" be invoked talismanically to excuse a trial court's abdication of its "gatekeeper role." Plaintiffs did not brief the harmless error doctrine and the panel did not offer any real harmless error analysis (apart from quoting the court rule in a footnote). Here, the harm to the defense cannot be overstated; Mr. Baldwin's testimony was critical to establishing Plaintiffs' damages. He had only a vague factual understanding of what the missing items were, he did not perform any sort of research (besides a Google search) or employ any recognized methodology, and he had no particular expertise in valuing sports memorabilia. Moreover, he previously gave contradictory testimony under oath regarding the only issue that he was put before the jury to discuss (valuation of the supposedly lost property). The lower court *sua sponte* prevented the jury hearing it. The prejudicial effect of this is reflected in the size of the jury verdict. This Court now has an opportunity to send a message to trial courts throughout the state regarding both the importance of their "gatekeeper role" and that cross-examination, specifically impeachment, is a bedrock of trial practice and should not be impeded absent extraordinary circumstances that were not present here.

The lower courts' handing of Plaintiff's attorney fee claim also has jurisprudential ramifications. Here, Plaintiffs moved for attorney fees as set forth in the Settlement Agreement. However, attorney fees awarded under contractual provisions are considered damages, not "costs." *Central Transp, Inc v Freuhauf Corp,* 139 Mich App 536, 548; 362 NW2d 823 (1984). As such, Plaintiffs were required to plead the attorney fees in the Complaint *and introduce evidence at trial* to support their contract claim. Stated differently, a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the

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attorney fees to establish a *prima facie* case and avoid a directed verdict. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996). Here, Plaintiffs made no reference to, and proffered no evidence regarding, their attorney fee claim at trial. By allowing Plaintiffs to advance their contractual attorney fee claim through a post-trial motion, the Court of Appeals reached a result that cannot be reconciled with *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194-195; 874 NW2d 367 (2015).

Pransky, 311 Mich at 194-195 states that in "order to obtain an award of attorney fees as damages under a contractual provision … the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term." Unlike "statutorily permitted or rules-based attorney's fees, contractually based attorney's fees form part of the damages claim. …. That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party." *Id.* *Pransky* held that "because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract. … A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding." *Id.* This is a precedentially binding decision that the panel here was required to follow. MCR 7.215(J)(1).

For these reasons, this Application presents issues "of major significance to the state's jurisprudence." MCR 7.305(B)(3). Similarly, for reasons explained below, the decisions of the lower courts conflict with this Court's precedent as well as precedent from the Court of Appeals. MCR 7.305(B)(5)(b). Also, the decisions were not only "clearly erroneous," but also "will cause material injustice" to the Defendants as reflected by the massive judgment entered against them, which the Court of Appeals has affirmed, leaving Defendants no further recourse. MCR 7.305(B)(5)(a).

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DATE AND NATURE OF THE ORDER APPEALED FROM

Defendants seek leave to appeal from the July 26, 2016 Opinion of the Court of Appeals. The Court of Appeals' opinion affirmed, in all respects, a September 25, 2014 Judgment entered in favor of Plaintiffs following a jury trial. In this business dispute, Plaintiffs alleged that Defendants breached a Settlement Agreement, which the parties entered into in 2008 in order to resolve a "business divorce," Oakland County Circuit Court No. 2007-087623-CK. A cascade of erroneous rulings in the trial court ultimately led to a $3 million jury verdict against the Defendants (and an ever larger Judgment after attorney fees were erroneously tacked on post-trial) in a suit where Plaintiffs' damages case rested entirely upon speculation, conjecture, and innuendo.

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RELIEF SOUGHT

Defendants respectfully request that this Supreme Court grant their Application for Leave to Appeal, allowing them to pursue an appeal of the Court of Appeals' July 26, 2016 decision.

In the alternative, Defendants respectfully request that this Supreme Court peremptorily reverse the Court of Appeals and the Circuit Court, and remand this action for a new trial with instructions that Mr. Baldwin either be excluded from offering expert testimony, or that Defendants be allowed to cross-examine him with the transcripts from both of the depositions he gave in this matter. Alternatively, should this Court decline to order a new trial, Defendants request that the Court peremptorily vacate the attorney fee award in Plaintiffs' favor, for reasons explained below.

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STATEMENT OF QUESTIONS INVOLVED

I. In this breach of contract action which arose out of the settlement of an earlier business dissolution dispute, were Defendants entitled a new trial where Plaintiffs clearly proffered Howard Baldwin as a damages expert, not merely a lay witness, and Mr. Baldwin did not satisfy MRE 702 and in turn should have been precluded from testifying?

The Trial Court answered "no."

The Court of Appeals answered "no."

Plaintiffs-Appellees will presumably answer "no."

Defendants-Appellants answer "yes."

II. Once Mr. Baldwin was allowed to testify, did the trial court reversibly err when it *sua sponte* deprived Defendants of the opportunity to impeach Mr. Baldwin with his prior deposition testimony, wherein Mr. Baldwin acknowledged various weaknesses in his "methodologies" and the factual foundation for his opinions.

The Trial Court answered "no."

The Court of Appeals answered "no."

Plaintiffs-Appellees will presumably answer "no."

Defendants-Appellants answer "yes."

III. Did the lower court err in awarding attorney fees to the Plaintiffs under the Settlement Agreement via a post-trial motion, where such fees were an element of their alleged breach of contract damages, and Plaintiffs failed to proffer evidence of attorney fees at trial?

The Trial Court answered "no."

The Court of Appeals answered "no."

Plaintiffs-Appellees will presumably answer "no."

Defendants-Appellants answer "yes."

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STATEMENT OF FACTS

On November 28, 2007, Plaintiffs filed an 11-count Complaint against Defendants, Case No. 2007-087623-CK ("underlying action"), alleging various business torts. (See Ex. 2, Defendants' Response to Motion for Summary Disposition, pp 1-2.) The underlying action arose out of a business dispute. (Id., p 2.) Plaintiffs' Complaint focused on obtaining certain hockey merchandise that was in Defendants' possession. The dispute centered around who owned the property that was specifically identified in the Complaint. (Id.) Defendants vigorously defended Plaintiffs' claims for nearly one year, and were fully prepared to defend the case through trial. However, on the eve of trial, the parties were ordered to attend facilitation. There, the parties mutually agreed to forgo the uncertainty of a trial and settle the action.[4]

On November 10, 2008, the parties' Settlement Agreement was reduced to writing, and executed by the parties.[5] As part of the parties' Settlement Agreement, Defendants agreed to deliver certain merchandise to Plaintiffs, as stated in ¶ 3.b of that agreement as follows:

> …(i) all remaining inventory of the Tribute Book, in the approximate amount of 1500 such books, plus all proofs of such books, and all dust jackets and inserts; (ii) Any and all original and copies of digital images, photographs (framed and unframed), and negatives, for all photos and images depicting any member of the Plaintiff Gordon Howe's family, including but not limited to Gordon Howe, Colleen Howe, Mark Howe and Marty Howe

[4] The explicit language of the Settlement Agreement states that nothing in the parties' Settlement Agreement constitutes an admission of any liability by any party. (Ex. 2, p 6 n 8.)

[5] In an unusual procedural maneuver, Plaintiffs filed their Motion for Summary Disposition, which claimed there was no question of material fact as to Defendants' Breach of the Settlement Agreement, but refused to attach the very document that they relied upon, claiming that it needed to be filed under seal. (See Ex. 3, Defendants' Application for Leave to Appeal in Court of Appeals Docket No. 309893, p 2 n 5; Ex. 2, pp 1-2 n 1.) The lower court later ruled that "[t]he settlement agreement must be filed under seal … [but] argument concerning the settlement agreement and any resulting orders and opinions regarding the settlement agreement will not be sealed." (Ex. 3, p 2 n 5.) In order to comply with this ruling, this Statement of Facts will cite to the lower court's opinions and the parties' briefs when discussing the terms of the Settlement Agreement.

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> (Howe Family), and including so-called *Kings of Their Sports* photographs (Kings Photos), whether signed or unsigned, personalized or not, physical, electronic or digital, or in any other format; (iii) Any and all originals and copies of videotapes, including all originals and copies of the deposition of Plaintiff Gordon Howe, the deposition of Companion Case Defendant, the deposition of witness Marty Howe, and originals and copies of any and all films, CD's, and other analog, electronic, or digital media depicting any image of Plaintiffs and/or members of the Howe Family; (iv) Any and all personal property depicting, relating, or in any way pertaining to Plaintiffs and/or any member of the Howe Family, signed or unsigned, personalized or not, including, but not limited to, hockey pucks, hockey sticks, hockey jerseys, equipment, bobble heads, books, hockey cards, tickets, jackets, flats, artwork, signs, programs, newspaper articles, posters, autographs, or any other item of physical property (Memorabilia); (v) Defendants shall each use best efforts, in good faith, to search for such Memorabilia … and Defendants hereby represent and warrant that they shall not retain any Memorabilia or other items required for satisfaction of this paragraph 3.b., whether in their possession or the possession of others on their behalf. (See Ex. 2, pp 6-7.)

Defendants also agreed to destroy certain other property, in their possession, which in any way may relate to the Howe family. In particular, the parties formed a safe harbor provision that allowed Defendants to destroy their own personal belongings, which relate to the Howe family. (Id.) Defendants knew the Howe family for a decade. In that time, Defendants were very close to the Howe family. They were like family. As such, it was mutually understood that some of Defendants' personal and sensitive property may relate to the Howe family. So, rather than require Defendants to turn over these belongings, they had the option to destroy the material *or* turn it over to Plaintiffs. Specifically, paragraph 3.c of the subject Settlement Agreement reads, in relevant part:

> …[Defendants] shall retain nothing in their possession which in any way depicts, relates, or in any way pertains to the Howe Family including any originals or copies, digital, electronic, or analog, and all sources of digital or electronic copies shall be permanently erased or turned over to Plaintiffs…. (Ex. 2, p 7.)

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In other words, Paragraph 3.b of the Settlement Agreement required Defendants to deliver to Plaintiffs' counsel *merchandise.* On the other hand, Paragraph 3.c of the parties' Settlement Agreement required Defendants to *permanently erase* – in other words, destroy[6] – any other property in their possession that may have in any way related to the Howes. (Id.) As Defendants argued below, in order to give meaning to both of these provisions, paragraph 3.c can only be read to explicitly allow Defendants to destroy their own personal effects and property, as it was not the merchandise, as listed in paragraph 3.b. (Id.)

Defendants went to great lengths to document their compliance with the Settlement Agreement. On November 24, 2008, Defendants turned over to Plaintiffs' counsel the merchandise identified in paragraph 3.b of the Agreement. (Ex. 1, *Power Play,* unpub op at 2.) Similarly, on November 20, 2008 and November 22, 2008, Defendants "*permanently erased*" their own personal property which may have related to the Howe family[7] as mandated by both the Settlement Agreement and Permanent Injunction. (Ex. 2, p 8.) Defendants never concealed the destruction of this property. (Id.) On the contrary, and without any obligation to do so, Defendants provided evidence, by way of two invoices, to Plaintiffs' counsel that Defendants complied with paragraph 3.c of the parties' Settlement Agreement (as well as the Permanent Injunction), and retained nothing in their possession that may relate to the Howe family.

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[6] Similarly, the permanent injunction required Defendants to "immediately remove any reference to the Plaintiffs and any and all members of the Howe family…from any sources under Defendants' possession and control." (See Ex. 2, p 8 n 9.)

[7] Defendants' personal property that was destroyed included personal family audio tapes, voice mail tapes, personal family recordings, privileged court documents and documents from Mike Reddy's travel business that has nothing at all to do with any case involving PPI or Gordon Howe. (See Ex. 2, p 8 n 10, citing the Affidavit of Mike Reddy.) Indeed, at trial Mike Reddy testified that "[n]ot one thing in the 26 banker boxes that you're talking about had anything to do with the Howes other than my privileged and court information, period. … All 26 boxes consisted of stuff from my businesses" unrelated to the Howes. (6/10/13 trans, p 171.)

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Notwithstanding the foregoing, Plaintiffs filed a Motion for Entry of Consent Judgment in the underlying 2007 action, despite having no basis for doing so under the plain language of the Settlement Agreement. (Ex. 1, *Power Play*, unpub op at 2.) On September 22, 2011, the Court of Appeals reversed that holding, and found that Plaintiffs were not entitled to a Consent Judgment. (Id.)

In light of the Court of Appeals' September 22, 2011 ruling – which Plaintiffs did not attempt to appeal to this Court – Defendants were optimistic that Plaintiffs would stop their harassment. However, Plaintiffs filed this lawsuit a few weeks later. Fairly early on, it became apparent that the Plaintiffs' case was going to rest upon speculation and innuendo. For example, in a Request for Admission, Defendants asked:

> REQUEST FOR ADMISSION NO. 1
>
> Please admit you have no personal knowledge concerning the specific content of property you allege was destroyed by Defendants after execution of the parties' Settlement Agreement. (Ex. 2, p 9.)

In Response, Mark Howe – signing the responses in his capacity as Plaintiff PPI's representative – answered as follows:

> ANSWER:
>
> Plaintiffs object to this request for admission as it seeks to impose the Defendant's burden of proof upon the Plaintiffs. Under Michigan law, the destruction of evidence results in a presumption of adverse content against the party destroying the evidence and shifts the burden of proof to that party. Without waiving any objections, the content had to do with Gordon Howe, his family, appearances, as well as business records; *upon information and belief*. (Id., pp 9-10, emphasis added.)

In other words, Plaintiffs admittedly had no personal knowledge concerning the content of the materials allegedly destroyed. This fact was underscored by Plaintiffs' inability to identify

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a single item that Defendants allegedly destroyed, as requested in the follow-up interrogatory. (Id.) Similarly, Plaintiffs' answer to the first follow up Request for Production of Documents illustrated that Plaintiffs had *no evidence to demonstrate the specific property they allege Defendants destroyed in violation of the Settlement Agreement.* When asked to produce each document they intended to rely upon to show what property Defendants allegedly destroyed after the execution of the Settlement Agreement, Plaintiffs stated: "there are no documents which can be introduced to demonstrate the content." (Ex. 2, p 10.)

Despite this record, Plaintiffs moved for summary disposition as to liability in the instant case, Case No. 11-123508-CK, on December 7, 2011. (Ex. 3, p 6.) Plaintiffs' motion was based entirely upon the assertion that Defendants destroyed Plaintiffs' property, in violation of the Settlement Agreement. However, the only documentary evidence offered in support of this argument was an Affidavit from Aaron Frezza, dated February 24, 2009. (See Ex. 3, p 6; Ex. 2, p 12.) Mr. Frezza is a manager for a company called "Shred-It." (See Ex. 2, p 12.) "Shred–it" was the company Defendants used to permanently erase and destroy *Defendants'* personal property, in compliance with paragraph 3.c of the Settlement Agreement and Permanent Injunction. (Id.) Plaintiffs argued below that Mr. Frezza's Affidavit established that Defendants destroyed *Plaintiffs' personal property* in violation of the subject Agreement. (Ex. 3, p 6.) However, as Defendants' Response Brief explained below, Mr. Frezza lacked the requisite personal knowledge to testify in this matter, let alone establish that the Defendants breached the Agreement by destroying Plaintiffs' property. (Id.; Ex. 2, p 12.) Indeed, Mr. Frezza executed a supplemental, clarifying Affidavit, dated January 13, 2012, wherein he stated:

> ¶ 4. …[T]he Affidavit dated February 24, 2009 … was not prepared by me.
>
> ***

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> ¶ 6. I was not present to witness the destruction of any items listed in shredded invoices mentioned in paragraph 5 of this Affidavit [dated February 24, 2009].
>
> ¶ 7 I was not present when the items listed in the invoices were allegedly received by Shred-It.
>
> ¶ 8 To clarify the February 24, 2009 Affidavit…I did not see the contents listed in Shred-It invoice No. 2664894596 or Shred-It invoice No. 2664894702.
>
> ¶ 9 Further, I never met Mike Reddy, Aaron Howard or Del Reddy. (Ex. 2, p 12.)[8]

On February 22, 2012, Defendants filed a Response to Plaintiffs' Motion, setting forth the arguments summarized above and requesting summary disposition in Defendants' favor under MCR 2.116(I)(2). (Ex. 2, pp 4, 20.) The lower court conducted a hearing on March 30, 2012 and, after taking the matter under advisement issued an Opinion and Order granting Plaintiffs' motion on April 6, 2012. (Ex. 4.) Although the opinion was nearly nine pages long, it largely consisted of background facts. To the limited extent that the lower court engaged in construction of the Settlement Agreement's terms, it misstated critical language; at page 4 of the opinion, the lower court found that ¶ 3.c of the Settlement Agreement required the materials in question to "be permanently erased *and* turned over…." (Id., p 4, emphasis added.) However, as reflected in both side's trial court briefs, ¶ 3.c actually states "permanently erased *or* turned over." (See Ex. 4, p 7.)

While giving only cursory attention to the Settlement Agreement's terms, the trial court devoted considerable attention to this Court's decision in the underlying lawsuit. (Ex. 4, pp 4-6, 8.) The trial court seemed particularly interested in explaining why its June 3, 2010

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determination in Case No. 2007-087623-CK (that destroying the aforementioned items violated the Settlement Agreement) somehow survived the Court of Appeals' reversal of that very same Order. (Id., p 8.) The trial court appears to have concluded that, because the Court of Appeals' September 22, 2011 opinion did not expressly reject the prior finding of a breach, that finding had not been disturbed and should be followed here. (Id.)

The trial court's granting of Plaintiffs' motion left Defendants able to defend the breach of contract claim "on the issue of damages only." (Ex. 4, p 9.) After Defendants unsuccessfully sought interlocutory review of the partial summary disposition holding in Plaintiffs' favor, the parties conducted discovery regarding the nature and amount of Plaintiffs' alleged damages. On August 10, 2012, Defendants filed a "Motion for Summary Disposition on Want of Damages." In this motion, Defendants argued that Plaintiffs' discovery responses confirmed that their only proofs regarding damages were based upon speculation and conjecture regarding the nature and value of the destroyed materials. The trial court heard this motion on October 3, 2012, and denied it through a written Opinion and Order later that day. (Ex. 5.) Conflating the elements of breach and damages, the trial court concluded that this motion was basically a rehash of the Defendants' arguments in opposition to Plaintiffs' Motion for Summary Judgment as to Liability. (Id., p 11.) Accordingly, Judge Bowman denied Defendants' motion. (Id.)

Discovery proceeded, and Defendants deposed Plaintiffs' proffered damages expert, Mr. Baldwin. At his discovery deposition, Mr. Baldwin testified that he had no knowledge concerning the materials that Defendants allegedly destroyed, and could not put a value on any of the subject property to support the damage element of Plaintiffs' case. On cross-examination,

---

[8] It was clear that Mr. Frezza had no probative damage evidence whatsoever to offer, yet his earlier affidavit was the sole proof offered in support of Plaintiffs' bald assertion that it was their property that had been destroyed as *a matter of law*. (See Ex. 3, pp 6-7, 17.)

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Mr. Baldwin admitted that he had absolutely no knowledge at all as to what materials may have been destroyed, and therefore could not say that the destroyed materials had any value:

> Q. …[S]itting here today, you know, you were asked various questions about certain materials that were destroyed or not destroyed. You never inspected any materials that plaintiff alleged that my clients destroyed in this case, correct?
>
> A. Correct.
>
> Q. So sitting here today you wouldn't know the value of any of those materials, correct?
>
> A. *If I don't know what the materials were I wouldn't be able to put a value on it.* (Ex. 6, 5/28/13 Emergency Motion in Limine, pp 9-10.)[9]

The extremely limited factual basis for Mr. Baldwin's opinions was further illustrated by the following:

> Q. …[Y]ou were asked various questions about certain materials that were destroyed or not destroyed. You never inspected any materials that Plaintiff alleged that my clients destroyed in this case, correct?
>
> A. Correct.
>
> ***
>
> Q: …[D]id you ever physically look at any memorabilia that the Howes currently have before producing the film?
>
> A. *No.*
>
> Q: Did you ever ask to look at the family's memorabilia collection?
>
> A. …I don't recall it.
>
> ***

[9] The relevant excerpts from Mr. Baldwin's deposition transcripts were attached to this motion.

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> Q: Sir, did Plaintiffs' counsel provide you with a witness list as to who they intend to call at trial to lay the foundation for your testimony?
>
> A. No
>
> Q. …Plaintiff's counsel never told you of anyone with personal knowledge who actually knows some specific piece of personal property that the Howes are now missing; is that correct, you never had that conversation?
>
> A. I never had that conversation.
>
> ***
>
> Q: [Y]ou just testified you can't place a monetary value on how much a single still or a single clip would have on a particular film, correct?
>
> A. Correct. (Ex. 6, pp 10-11.)

Mr. Baldwin based his entire valuation opinion in this case on a then-recent dispute between Kobe Bryant and Kobe Bryant's mother. (See Id., p 3.) In particular, Mr. Baldwin testified that since Kobe Bryant and Gordon Howe are both icons in his mind and Kobe Bryant's dispute is between $496,000 and $1 million dollars that Gordon Howe's allegedly destroyed memorabilia could be worth that amount as well. (See Id., p 4, citing Mr. Baldwin's deposition at pp 81-82.) Mr. Baldwin readily admitted that his valuation was not based on any facts:

> Q. …[L]et's be clear about the numbers that you used in this case where you said that you believe the value could be $500,000 to over seven figures, what I want to know is the factual basis that you are relying upon to come to that calculation. How did you arrive at that number?
>
> A. There are no facts without actually knowing … what we're talking about here. … *So everything is hypothetical. Everything is hypothetical.*
>
> ***

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> Q. …[S]itting here today you have seen no large inventory that you looked at to base your opinion on, correct?
>
> A. Well, I never said I had. Yeah. (Ex. 6, p 13.)

Moreover, Mr. Baldwin's qualifications as an expert were questionable. Simply put, nothing in his background as a Hollywood movie producer seemed to give him any particular expertise in valuing the sports memorabilia at issue here. (See Ex. 7, 9/26/12 Motion in Limine, pp 5-6; Ex. 6, pp 5-8.) For these reasons Defendants moved to exclude his testimony on September 26, 2012. (Ex. 7.) The trial court heard the Motion in Limine at the same time as the aforementioned "Motion for Summary Disposition on Want of Damages," as the two motions raised similar issues (i.e, the sufficiency of Plaintiff's evidence regarding what was destroyed). (10/3/12 trans, pp 24-26, 28, 34.) The trial court denied Defendants' Motion in Limine. (Id., p 48-49.) Defendants raised similar challenges to Mr. Baldwin in a second motion, filed shortly before trial, immediately after Mr. Baldwin's *de bene esse* deposition. (Ex. 6.) The lower court denied that motion as untimely. (6/14/13 trans, p 22.)

The matter proceeded to trial in June of 2013. At trial, Mr. Baldwin opined that the materials allegedly destroyed by Defendants could be worth a total of $500,000 to $1,000,000. (6/14/13 trans, p 52.) He further testified that his opinion was based on factual evidence that Gordie Howe was specifically associated with the allegedly destroyed materials. (Id., pp 71, 82-83.) This assertion of value was categorially contradicted by his previous sworn deposition testimony, wherein he testified he had no foundation to support *any* opinions regarding the value of any of the unidentified items allegedly destroyed in this case. (See Ex. 6, pp 9-10, 13, quoting Mr. Baldwin's *de bene esse* deposition at pp 55, 82-84.) In light of this, Defendants' counsel attempted to impeach Mr. Baldwin at trial (for the first time, of many times that were planned), with this prior testimony.

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When Defendants' counsel attempted to impeach Mr. Baldwin, Judge Bowman directed counsel to approach and, during a side bar, held that Mr. Baldwin's prior testimony could not be used at all at trial, even to impeach the witness. (6/14/13 trans, p 101.) Defendants' counsel twice referred Mr. Baldwin to his deposition transcript before the Court stopped the questioning. (Id., p 100.) While the details of this side bar were not fully articulated in the trial transcript, the sidebar exchange was captured by the trial court's audio/visual recording system. (Ex. 8, Affidavit of Anthony Randazzo, ¶¶ 15-20.) The recording confirmed that Defendants' counsel "intended to impeach the witness, Howard Baldwin, with his prior inconsistent statements given at two prior depositions in this case." (Id., ¶ 17.) Judge Bowman "ruled that [Defendants' counsel] was not to ask any cross-examination questions of the witness based on the depositions, because the Court previously ruled that the *de benne esse* deposition of Howard Baldwin was not to be played." (Id., ¶ 18.) Defendants' counsel "told the court that the questions and answers of Mr. Baldwin contained in the *de benne esse* deposition were the same exchange in another prior deposition in this case." (Id., ¶ 19.) Nonetheless, Judge Bowman "made it clear that [Defendants' counsel] was to ask no cross-examination questions of Mr. Baldwin based on prior inconsistent statements under oath." (Id., ¶ 21.) This interruption of Defendants' counsel's cross-examination of Mr. Baldwin – and the concomitant preclusion of Defendants' counsel's use of the deposition testimony – all came about *sua sponte*; it was not prompted by any objection from Plaintiffs' counsel but rather, it all emanated from the bench.

At the conclusion of Plaintiffs' proofs, Defendants moved for a directed verdict. (6/14/13 trans, p 111.) The lower court denied that motion. (Id., pp 119-120.) The jury returned a verdict in favor of the Plaintiffs, and against the Defendants jointly and severally, in the amount of $3 million. (6/18/13 trans, p 8.) The lower court did not enter a Judgment until more than a year

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later, on September 24, 2014. (Ex. 9.) In the interim, the lower court entertained Plaintiffs' motion for attorney fees, which were allegedly recoverable under the Settlement Agreement. (7/10/13 trans; 10/15/13 trans.) Defendants objected on the grounds that "law is clear, when you're seeking attorneys' fees as a part of a damage for a contract … it is a contractual damage that must be submitted into evidence." (7/10/13 trans, pp 7-8.) Defendants further argued that "no evidence was presented [at trial] by way of the billings…." (Id., p 9.) The lower court overruled this objection and held that Plaintiffs could recover attorney fees under the Settlement Agreement, and it scheduled an evidentiary hearing to determine the amount of that award. (Id.) The amount, ultimately established after a October 15, 2013 hearing, was included in the September 24, 2014 Judgment. (Ex. 9.)

Defendants timely moved for judgment notwithstanding the verdict – based largely on the weakness of Plaintiffs' damages proofs – and for new trial – based on, among other things, the denial of impeachment with respect to Baldwin and the jury being given MI Civ JI 6.01(a). (1/14/15 trans, pp 5-8.) Defendants also moved for remittitur on the grounds that the jury's $3 million award could only be explained by the confusion regarding Mr. Baldwin's testimony (i.e., they construed his $1 million total to mean $1 million *per Plaintiff*). (Id., p 9.) The lower court denied all of Defendants' post-judgment motions on January 14, 2015, and Defendants timely appealed by right.

The Court of Appeals affirmed in all respects. With respect to Mr. Baldwin's qualifications, the panel found:

> Notably, although the trial court instructed the jury regarding expert witness testimony, plaintiffs never moved to qualify Baldwin as an expert at trial and plaintiffs never elicited expert testimony from Baldwin. Rather, a review of his testimony reveals that Baldwin merely provided lay witness testimony based on his experience producing a film about Gordie Howe and other films.

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Baldwin testified that he had been producing films for over 30 years. Movies he has produced include, Ray, Sahara, Mystery Alaska, and Sudden Death. Baldwin also testified that he recently produced a film about Gordie Howe in 2012, entitled Mr. Hockey, which was released in Canada in April 2013. He testified that they had to recreate most of the memorabilia and footage because the Howe family was unable to supply it. In making Ray, Baldwin testified that he had access to personal footage of Ray Charles, which was "really helpful" for authenticity of the movie, especially to recreate scenes. Baldwin testified that having access to home movies or personal footage also allows the actors to become acquainted with the character they are playing to learn their mannerisms and particular nuances.

Baldwin further testified that as a producer he was familiar with production costs. He testified that he produced at least ten films where he had to acquire "life rights," and testified that it could cost anywhere from $500,000 to over $1,000,000 to acquire life rights, memorabilia, and personal footage and images, depending on the extent that he would use them. In lieu of personal footage for Mr. Hockey, he did obtain some playing footage from the National Hockey League, which was about a minute and a half in length, and which cost him $75,000. Baldwin testified that normally the NHL charges $150,000, but he received a "friends and family discount." When asked what value he would place on the destroyed property, Baldwin testified that if all of the 1,389 tapes that were destroyed contained images or footage of Gordie Howe and were available to him for a film, it would be "incredibly valuable" and worth millions of dollars, given that he paid $75,000 to the NHL (which normally charges $150,000) for one and a half minutes of playing footage. However, he acknowledged that he could not place an exact monetary figure on the property without knowing exactly what was on the tapes.

While Baldwin's testimony certainly involves some type of specialized knowledge, it did not rise to the level of expert testimony. Specifically, Baldwin did not provide an opinion as to the value of the destroyed property containing personal footage of Gordie Howe based on movie industry standards as a whole, and his testimony did not involve principles and methods. Rather, he testified what he would have paid for personal footage of Gordie Howe based on his experience producing a movie about Gordie Howe and other sports celebrities. His testimony was based on personal knowledge of the matter and was helpful to the

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> determination of a fact in issue, i.e., the value of personal footage of Gordie Howe. Therefore, the trial court did not err by denying defendants' motions for JNOV or new trial on this ground because Baldwin provided proper lay opinion testimony…. (Ex. 1, *Power Play*, unpub op at 8-10.)

The panel further noted:

> Aside from the trial court's brief reference that "plaintiffs' expert" (referring to Baldwin) would be called to testify via Skype, defendants were the only people to refer to Baldwin as plaintiffs' expert when they attacked his qualifications in their opening statement. Plaintiffs asserted at oral argument that they did move to qualify Baldwin as an expert and were asked by the trial court to lay a foundation. However, a review of the record shows that the only time plaintiffs were asked to lay a foundation was when defendants objected to Baldwin's testimony regarding the value of the footage relating to Howe. Defendants' objections were based on speculation, lack of foundation (no facts in evidence), and relevance. The trial court never formally declared Baldwin to be an expert. At most, the trial court and the parties all seemed to act as if he were qualified as an expert. However, all, or almost all, of his testimony was lay testimony based on his own experience. …[T]o the extent Baldwin gave expert testimony, its admission was harmless error.
>
> ***
>
> Even if we were to conclude that Baldwin's specialized knowledge of film production costs rendered his testimony expert testimony, the admission of his testimony would be harmless error. … A review of the record shows that Baldwin was qualified to provide expert testimony regarding the costs associated with film production based on his knowledge and experience as a film producer for over 30 years. (Id., p 9 n 3, p 10 n 4.)

With respect to the limitations on Defendants' cross-examination of Mr. Baldwin, the panel found:

> Defendants next argue that the trial court prevented them from impeaching Baldwin regarding his prior deposition testimony, and therefore, it should have granted defendants' motion for a new trial. Generally, we review for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial…. However, defendants failed to preserve this issue by making an offer of proof

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> at trial. Under MRE 103(a)(2), the proponent of the excluded evidence must make an offer of proof to preserve the issue for appeal, unless it is apparent from the context of the questions asked. … In this case, it is not apparent from the context of the questions asked what the substance of the impeachment evidence was. Defense counsel never attempted to make a record of the trial court's ruling, take issue with the ruling, or ask a substantive question in an attempt to impeach Baldwin. Rather, the record of the trial implies that defense counsel was satisfied with the ruling made during the bench conference. It was particularly imperative in this case that defendants make a record of the alleged error, particularly where they claim that the trial court made a ruling at the bench conference that prevented them from doing any effective cross-examination of Baldwin, but the trial court stated that it was merely preventing defense counsel from questioning Baldwin about his *de bene esse* deposition, which was stricken from the record at defendants' request.
>
> Further, defendants' argument that the substance of the evidence was made known in their motion in limine filed before trial is unavailing. The motion in limine sought to exclude all testimony of Baldwin and did not involve the impeachment issue at hand. Based on the record, it appears defendants did not inform the trial court what they wished to impeach Baldwin on until they filed their motion for a new trial. Without a record, this Court is left to speculate as to what defendants intended to do at trial and what exactly the trial court ruled on during the bench conference. Therefore, we decline to address this unpreserved issue. (Ex. 1, *Power Play*, unpub op at 10-11.)

The panel again elaborated in the footnotes:

> Even if we were to conclude that defendants properly preserved this issue for appeal, any error in preventing defendants from using the deposition to impeach Baldwin was harmless. … It appears the primary testimony from Baldwin's *de bene esse* deposition that defendants wished to impeach Baldwin with were his statements regarding how he calculated the value of the destroyed property. Specifically, he stated, "There are no facts without actually knowing what was—what we're talking about here. So everything is hypothetical. Everything is hypothetical." Using Baldwin's deposition to impeach his trial testimony likely would not have made a difference where Baldwin's trial testimony makes it clear that he was giving an estimate of damages and that he could not place a specific monetary value on the images and footage without knowing the content. (Id., p 11 n 5.)

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With respect to Plaintiff's attorney fee claim, the panel affirmed as follows:

> Defendants next argue that the trial court erred by granting plaintiffs' post-judgment motion for contractual attorney fees. Defendants … argue that the attorney fees were part of plaintiffs' breach of contract claim and had to be specifically pleaded and proven at trial, not in a post-trial motion….
>
> Paragraph 5 of the settlement agreement provides in relevant part, "The prevailing party in any proceeding to enforce this agreement, or any remedy contemplated by this Agreement, shall be entitled to recover, in addition to any other remedy, actual costs and attorney fees incurred in the enforcement."
>
> …While a party is not required to specifically plead an award of attorney fees under a contractual provision, the party seeking the award of attorney fees still must do so as part of a claim against the opposing party. … In this case, in the complaint, plaintiffs requested attorney fees and costs as part of their damages for bringing this action. Therefore, plaintiffs sufficiently stated a cause of action to recover attorney fees under the contract.
>
> With regard to whether plaintiffs were required to submit proof of their attorney fees at trial as part of their damages claim, defendants rely on an unpublished case, which cites *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190; 555 NW2d 733 (1996), to support their argument. In *Zeeland*, this Court stated that "[a] party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict." *Id.* at 196. However, this Court did not specifically state that contractual attorney fees must be proven at trial. Rather, *Zeeland* involved a debt collection action, in which the plaintiff sought to recover the balance due on the defendant's open account and the attorney fees incurred in collecting the debt as permitted by the credit agreement. *Id.* at 191–192. It appears that the attorney fees were already incurred in attempting to collect the debt, and the plaintiff was seeking to recover the fees as part of its claim. *Id*. at 192–193. Therefore, this Court noted that the plaintiff was required to introduce evidence of the reasonableness of the attorney fees to avoid a directed verdict. *Id*. at 196.
>
> In this case, plaintiffs could not prove at trial that they were entitled to attorney fees or the reasonableness of those fees, where the contract explicitly states that a party cannot recover attorney fees until they prevail in the action to enforce the agreement.

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> Plaintiffs did not prevail in the action to enforce the agreement until the jury decided the issue of damages. In *Zeeland*, the credit agreement permitted the plaintiff to recover its attorney fees if defendant breached the agreement, *id.* at 199, which is different from this case, where the contract allows either party to recover attorney fees if they prevail in an action to enforce the agreement. ...[T]his could not be determined until after the jury decided the case. Therefore, the trial court did not err by holding an evidentiary hearing regarding the reasonableness of plaintiffs' attorney fees, and subsequently granting plaintiffs' post-judgment motion for contractual attorney fees. (Ex. 1, *Power Play,* unpub op at 13-14.)

Defendants moved for reconsideration in the Court of Appeals, and the Court of Appeals denied reconsideration on July 26, 2016.[10] Defendants now bring this Application for Leave to Appeal.

STANDARD OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. As stated above, the jurisprudential significance of the aforementioned errors lies in the centrality of expert witnesses to modern litigation, and importance of ensuring that expert testimony is reliable. The trial court has a "gatekeeper role" which "applies to all stages" of litigation. Courts cannot be allowed to abdicate this responsibility simply by calling someone a lay witness, contrary to the arguments of both parties. Similarly, the lower courts' handling of Mr. Baldwin's cross-examination has statewide ramifications, given the supreme importance of cross-examination and admissibility of prior inconsistent statements as recognized in *Ruhala v Roby*, 379 Mich 102, 124-125; 150 NW2d 146 (1967). This Application therefore presents issues "of

[10] The July 26, 2016 opinion of the Court of Appeals, attached as Exhibit 1, vacated an earlier Court of Appeals opinion issued on June 9, 2016 in order to correct a non-dispositive factual error. This is explains how the order denying reconsideration in the Court of Appeals, and the opinion appealed from, were issued on the same date.

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major significance to the state's jurisprudence." MCR 7.305(B)(3). Also, the lower courts' handling of Plaintiffs' attorney fee claim conflicts with binding precedent from the Court of Appeals. MCR 7.305(B)(5)(b). Also, the decision is not only "clearly erroneous," but also "will cause material injustice" to Defendants, as Defendants have been saddled with a massive monetary responsibility and have no further recourse. MCR 7.305(B)(5)(a).

The second standard of review relates to the actual decision of the court below that is the subject of the application. A trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Lockridge v Oakwood Hosp,* 285 Mich App 678, 689; 777 NW2d 511 (2009). Similarly, a "trial court's limitation of cross-examination is reviewed for an abuse of discretion." *People v Sexton,* 250 Mich App 211, 221; 646 NW2d 875 (2002). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Lockridge,* 285 Mich App at 689. But "when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed *de novo*...." *Lockridge,* 285 Mich App at 689.

"[W]ith respect to an award of attorney fees, we review underlying findings of fact for clear error, … while questions of law are reviewed *de novo*…." *In re Temple Marital Trust,* 278 Mich App 122, 128; 748 NW2d 265 (2008) (citations omitted). "But we review the court's decision whether to award attorney fees and the determination of the reasonableness of the fees for an abuse of discretion." *Id.* However, "[w]hether a party is entitled to attorney fees and costs pursuant to a contract is a question of law that we review *de novo*." *T-Craft, Inc v Global HR,* unpublished opinion per curiam of the Court of Appeals, issued July 1, 2010 (Docket No. 285916), p 3 (Ex. 10).

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Where the standard of review is *de novo*, appellate courts should not consider themselves "bound to any degree by the opinions of the trial courts on questions of law." Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, NY: Lawyers Cooperative Publishing, 1985), § 7.27, p 138. This is because "[o]ne of the purposes in having appellate courts, i.e., to ensure uniformity in the application of the law, would be lost if the appellate courts had to give substantial deference to the trial court's views.... The almost universal rule is ... that the appellate court is free to come to its own conclusions on questions of law." *Id.* See also *Department of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 115-116; 490 NW2d 337 (1992), noting that "[t]he term '*de novo*' has been defined as 'anew; afresh; again; a second time; once more; in the same manner, or with the same effect.' … The very concept of '*de novo*' means that all matters therein are to be considered 'anew; afresh; over again.…'"

"*De novo* review is sometimes referred to as 'plenary review,' no doubt because it allows the court to give a full, or plenary, review to the findings below." Beazley, *A Practical Guide to Appellate Advocacy,* (New York: Aspen Law & Business, 2002), § 2.3.1(b), p 15. Courts applying this standard "look at the legal questions as if no one had as yet decided them, giving no deference to any findings made below." *Id.* "When this standard is applied, the reviewing court is permitted "to substitute its judgment for that of the trial court…." *Id.*

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ARGUMENTS

I. In this breach of contract action which arose out of the settlement of an earlier business dissolution dispute, Defendants were entitled to a new trial where Plaintiffs clearly proffered Howard Baldwin as a damages expert, not merely a lay witness, and Mr. Baldwin did not satisfy MRE 702 and in turn should have been precluded from testifying.

A trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Lockridge*, 285 Mich App at 689. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* Defendants first raised this argument in their September 26, 2012 "Motion in Limine to Preclude Howard Baldwin from Testifying at Trial on Issues of Damages." The lower court denied that motion at the October 3, 2012 hearing, and issued an Order later that day. (See 10/3/12 trans, pp 23, 28-32, 48-49.) At that time, the court reopened discovery to allow Defendants to depose Mr. Baldwin. (Id., pp 48-49.) After deposing Mr. Baldwin, Defendants sought to renew their request that he be precluded from testifying at trial, by way of a May 28, 2013 "Emergency Motion in Limine"; the lower court denied that request, and declined to consider the renewed motion on its merits, through an order entered that same day. After trial, Defendants also moved for JNOV on the grounds that, *inter alia*, Mr. Baldwin was erroneously allowed to testify.

Before any expert can present his theories to a jury, a trial court must exercise its "gatekeeper role," which applies to all stages of expert analysis. *Gilbert*, 470 Mich at 782. "MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise." *Gilbert*, 470 Mich at 782.

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"The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology." *Id.*

Gilbert was based largely upon the U.S. Supreme Court's holding in *Daubert,* 509 US at 597. In *Daubert,* the Court instructed trial courts to assume a "gatekeeper role" in determining the admissibility of proffered scientific testimony. The clear purpose was to stop "junk science" from becoming the centerpiece of a party's case in chief, and to limit testimony to expert opinion that had wide acceptance in the particular scientific community. The primary focus of *Daubert* is Federal Rule of Evidence (FRE) 702, which, unquestionably, contemplates some degree of regulation of proffered expert opinions. *Daubert,* 509 US at 589. FRE 702 embodies two basic requirements: (1) evidence must be reliable or, in other words, trustworthy; and (2) evidence must be relevant.

In *Daubert,* the Supreme Court identified several non-exhaustive factors that trial courts should consider in determining whether or not the testimony or evidence sought to be introduced pursuant to FRE 702 can be admitted. First, the trial court should evaluate whether the theory or technique can be tested. This factor ensures that the theory or technique in issue is: (1) defined; (2) related to a legitimate principal or discipline of science; and (3) derived from objective rather than subjective data. Second, the trial court must determine whether the proffered theory or technique has, in fact, been tested. Third, the trial court should consider the known or potential rate of error. Fourth, the trial court should evaluate whether the proffered opinion is "generally accepted" in the relevant scientific community. In short, there must be evidence that the proffered methodology underlying the expert's conclusions is not based on subjective belief or unsupported speculation. If the conclusions are based on subjective beliefs or unsupported

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speculations, then the conclusions are no more than "junk science,"[11] have no role whatsoever in a trial, and should therefore be excluded. *Daubert*, 509 US at 589.

MRE 702 is derived from FRE 702, and provides the following: "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Similar to FRE 702, MRE 702 requires regulation of the subjects and theories about which an expert may testify. Under MRE 702, the trial court is given the "gatekeeper role" and is required to determine the evidentiary reliability or trustworthiness of the facts and proffered data underlying an expert's testimony before such testimony is admissible. *Gilbert,* 470 Mich at 782; *Nelson v American Sterilizer Company* (On Remand), 223 Mich App 485; 566 NW2d 671 (1997).

Here, Howard Baldwin should have been precluded from testifying because he had no relevant expertise in valuation. As Defendants explained below, "… the only reason Mr. Baldwin was called to testify is because he is a celebrity who is a former owner of NHL hockey franchises, a producer of blockbuster movies such as *Ray, Mystery Alaska*, and *Sahara*, a good friend of Gordon Howe for over thirty years and a business partner of Gordon Howe. … However, … this case is not about an NHL Hockey Franchise. This case has nothing to do with movie production. And, the fact that Mr. Baldwin is a good friend of Gordon Howe does not

[11] In *Kumho Tire Company, Limited v Carmichael,* 526 US 137; 119 S Ct 1167 (1999), the Supreme Court broadened the application of *Daubert* to encompass all opinion testimony proffered by an expert witness. The *Kumho* Court opined that any such distinction between what is categorized as scientific and other areas of science would be unworkable. *Id.* at 141-142.

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excuse his lack of qualification and speculative nature of his singular opinion." (Ex. 6, p 4; see also Ex. 7, pp 5-6.)

Mr. Baldwin's lack of relevant expertise was established by the following exchange from his *de benne esse* deposition:

> Q. …Earlier you testified about two instances where you've provided expert testimony; do you recall that?
>
> A. Do I recall testifying to that? … Yes, I do.
>
> Q. In those two instances … [the testimony] pertained to the valuation of a hockey franchise; is that correct?
>
> A. No. One was a hockey franchise. The other was a basketball franchise.
>
> Q. …[B]oth instances dealt with the valuation of a professional sports franchise; is that correct?
>
> A. …That's correct.
>
> Q. …And you do understand that in this case there is no issue concerning the sale of any franchise in professional sports, correct?
>
> A. Of course I understand that.
>
> Q. …[S]o it's safe to say that you have never provided any expert testimony concerning the value of hockey memorabilia or personal property?
>
> A. …[T]hat is safe to say, correct. (Ex. 6, pp 6-7.)

Rather than relying upon "technical" or "other specialized knowledge" to "assist the trier of fact," MRE 702, Mr. Baldwin performed a Google search. (Id., p 7.) As he explained:

> Q. …[T]ell me … the calculation you used to come to … those figures.
>
> A. …Let me give you what it includes, okay? And everybody can Google it and see it [on] the internet because it's a very recent case of Kobe Bryant vs. his mother….

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> …[T]he hypothetical answer … is right there for people to see and for people to make up their own minds. Kobe Bryant is an icon. Gordie Howe is an icon, as is Mark and Marty and the value that … they're arguing over is somewhere between $496,000 and well over a million dollars. (Ex. 6, pp 7-8.)

Even if Mr. Baldwin had the requisite qualifications, his opinions should have been excluded because they were not based upon facts in evidence. As set forth above in the Statement of Facts, *Mr. Baldwin admitted under oath at* his *de benne esse deposition that he has absolutely no knowledge at all as to what materials may have been destroyed, and therefore could not state that the destroyed materials had any value.* (Ex. 6, pp 9-12.) ***Mr. Baldwin was*** never told that anyone with personal knowledge actually knew that anything from the Howe's memorabilia collection was missing. (Id., p 10.) He was not aware of any particular item of hockey memorabilia that the Plaintiffs were seeking recovery for. (Id.) Mr. Baldwin tried to bolster his opinions with testimony about a film clip of Gordie Howe that he had recently purchased from the National Hockey League, for use in a movie he was producing, for $75,000.00. (Id., p 11.) However, as Defendants argued in their motion in limine, this was irrelevant because the clip was from Gordie Howe's playing days, not from the time period that he was doing autograph sessions through Power Play International (which started approximately 15-20 years after his retirement). (Id.) There was no evidence that film or video from Gordie Howe's playing days were destroyed by the Defendants. (Id., pp 11-12.)

Moreover, Mr. Baldwin's personal knowledge about this irrelevant $75,000.00 purchase was itself dubious. At his *de benne esse* deposition, he testified:

> Q. Did you sign a contract to purchase the clips from the NHL that were used in your film of "Mr. Hockey"?

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A. No. The production does all that.

Q. …[Y]ou weren't involved in the actual signing of any agreements where Number Nine Productions purchased the film footage from the NHL, correct?

A. Correct. (Ex. 6, p 12.)

Mr. Baldwin's testimony on this point therefore lacked the requisite foundation pursuant to MRE 702, and should have been excluded. (See Id.) Indeed, all of his valuation figures were based upon speculation and conjecture, something Mr. Baldwin admitted in deposition testimony Defendants provided to the lower court as part of their second motion in limine. (Id., pp 12-14.)

The Court of Appeals' finding – that Mr. Baldwin was not offered as an expert, and that he "merely provided lay witness testimony based on his experience producing a film about Gordie Howe and other films" (Ex. 1, *Power Play*, unpub op at 8-9) – had no basis in the record and was nothing more than an excuse to avoid dealing with the more difficult issues presented by his testimony. The panel acknowledged that "Baldwin's testimony certainly involves some type of specialized knowledge," (Id. at 10), that the trial court referred to as him "plaintiffs' expert" just before Plaintiffs presented him (Id. at 9 n 3), that Defendants "attacked his qualifications in their opening statement" (Id.), that Plaintiffs "asserted at [appellate] oral argument that they did move to qualify Baldwin as an expert and were asked by the trial court to lay a foundation" (Id.), and that "the trial court and the parties all seemed to act as if he were qualified as an expert" (Id.).

"The distinction, although admittedly subtle, between lay and expert witness testimony is that lay testimony results from a process of reasoning that is familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *U.S. v Gyamfi*, 805 F3d 668, 674 (6th Cir 2015). Negotiating movie deals is not a

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"process of reasoning familiar in everyday life" and as the Court of Appeals acknowledged, Mr. Baldwin's testimony required specialized knowledge in a narrowly defined field. (Id., p 10.) Moreover, this Court acknowledged that not all of Mr. Baldwin's testimony was based on personal knowledge. (Id., p 9 n 4: "all, *or almost all,* of his testimony was lay testimony based on his own experience," emphasis added.) The mischaracterization of Mr. Baldwin as a lay witness – rather than an expert, as Plaintiffs repeatedly referred to him in the Court of Appeals (Ex. 12, pp 4, 16, 30-32, 34) – led to the Court of Appeals giving only a cursory nod to MRE 702 and a statement that any error was "harmless." (Ex. 1, *Power Play*, unpub op at 10 n 4.)

Had the Court of Appeals correctly viewed Mr. Baldwin as a proffered expert, it would have found his expert qualifications lacking and in turn, that the lower court erred in allowing him to testify for reasons explained above. Moreover, had the Court correctly viewed Mr. Baldwin as a proffered expert, it could not have invoked the harmless error doctrine, given the weakness of Plaintiffs' other damages proofs. As former Chief Justice Traynor noted, in his book on harmless error, "[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse. Any test less stringent entails too great a risk of affirming a judgment that was influenced by an error. Moreover, a less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predilections." *People v Mateo,* 453 Mich 203, 219-220; 551 NW2d 891 (1996) (citation omitted). This standard has been cited favorably in the civil context. *Johnson v Corbet,* 423 Mich 304, 336; 377 NW2d 713 (1985) (Levin, J., concurring).

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II. Once Mr. Baldwin was allowed to testify, Defendants were inexplicably – and without any objections by the Plaintiffs – deprived of the opportunity to impeach him with his prior deposition testimony, wherein Mr. Baldwin acknowledged various weaknesses in his "methodologies" and the factual foundation for his opinions. By *sua sponte* denying Defendants the ability to fully cross-examine Plaintiffs' sole damages expert, the lower court fundamentally impaired Defendants' ability to contest the Plaintiffs' claims, and Defendants are entitled to a new trial on this basis.

"A trial court's limitation of cross-examination is reviewed for an abuse of discretion." *People v Sexton,* 250 Mich App at 221. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Lockridge,* 285 Mich App at 689. Defendants sought to cross-examine Mr. Baldwin – Plaintiffs' only proffered damages expert, in a trial that was only about damages – with his deposition transcript during Mr. Baldwin's trial appearance of June 14, 2013. (6/14/13 trans, pp 100-101.) Defendants also moved for a new trial on this basis. (See 1/14/15 trans, pp 4-6, 14-15.) In responding to Defendants' Motion for New Trial, Plaintiffs argued that this issue had not been preserved because there was no offer of proof at trial, relative to Mr. Baldwin's deposition transcript. However, because "the substance of the evidence … was apparent from the context within which questions were asked," an offer of proof as to Mr. Baldwin's deposition transcript was not necessary. MRE 103(a)(2). See *People v Snyder,* 462 Mich 38, 43-44; 609 NW2d 831 (2000), holding that the exclusion of evidence was "adequately presented and preserved" at trial where "counsel was attempting to explain the nature and content of the proposed impeachment when he was cut off by the circuit court." See also *People v Blackston,* 481 Mich 451, 494 n 10; 751 NW2d 408 (2008). Moreover, the particular testimony that Defendants' counsel sought to use for impeachment was "apparent from the context" because it was already in the record, as it had been attached as an exhibit to Defendants' May 28, 2013 Emergency Motion in Limine. (See Ex. 6; see also 1/14/15 trans, p 15.) Much of the testimony that Defendants sought to use at

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trial had also been attached to their February 27, 2013 "Motion for Summary Disposition on Want of Damages." (Ex. 11.)

The most fundamental cross-examination tool is impeachment. See *Int'l Union, UAW v Dorsey*, 273 Mich App 26; 730 NW2d 17 (2006), where the panel stated that MRE 607 "allows the credibility of ***any*** witness to be attacked by ***any*** party." *Id.* at 29 (emphasis added). The panel further reiterated the fact that MRE 613 "acknowledges that a witness may be asked about prior inconsistent statements." *Id.* at 29-30. The *Dorsey* panel found that cross-examining a witness, with an inconsistent statement in a previous court proceeding transcript, is appropriate to impeach the credibility of the witness. *Id.* at 31. The panel explained:

> If the prior statement of the witness is contradictory of his present story on the stand, the opportunity for testing the veracity of the 2 stories by the 2 parties through cross-examination and re-examination is ideal. Too often the cross-examiner of a dubious witness is faced by a smooth, blank wall. The witness has been able throughout to present a narrative which may be false, yet is consistent with itself and offers no foothold for the climber who would look beyond. But the witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common-law practice of cross-examination and re-examination was invented to explore. It will go hard, but the 2 questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and thus reveal which is the true story and which the false. It is hard to escape the view that evidence of a previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.

Dorsey, 273 Mich App at 30, quoting *Ruhala*, 379 Mich at 122.

Ruhala discussed the supreme importance of cross-examination and admissibility of prior inconsistent statements, regardless of whether the statements are used for only impeachment or as substantive evidence. Even in 1967, the Court fully appreciated that "[t]he status of the law regarding the admissibility of prior inconsistent statements is relatively settled. Such statements

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are generally admissible for impeachment purposes[12] and are also admissible when they constitute an admission by a party opponent." *Id.* at 118. The Court also discussed the nature of cross-examination,: *Ruhala,* 379 Mich at 124:

> Cross-examination presupposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have him affirm it. Cross-examination is in its essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner's success.

And of particular importance here, this Court recognized the importance of impeachment with respect to prior inconsistent statements, *Ruhala,* 379 Mich at 125:

> The would-be cross-examiner is not only denied the right to be the declarant's adversary, he is left with no choice but to become the witness' friend, protector and savior. Though he may be permitted to ask questions in the form of cross-examination, the substance of his effort will be redirect examination and rehabilitation. The reason is simple. The witness cannot recant! Every cross-examiner tries to bring the witness to the point where he changes his story – literally eats his words – in the presence of the jury.
>
> A statement made from the witness stand is not beyond total recall by the witness. Stale friendly cross-examination "with respect to" a prior extrajudicial statement is no substitute for timely, adversary cross-examination "upon" a statement.

[12] This proposition is supported by the current Michigan Rules of Evidence. For example, MRE 105 entitled, "Limited Admissibility", demonstrates that evidence may be used for one purpose at trial, but not for other (in other words, drawing a distinction between substantive and impeachment evidence). MRE 613, entitled "Prior Statements of Witnesses," expressly allows for the examination of witnesses with their prior inconsistent statements. MRE 801(d)(1) establishes that a Prior Statement of Witness is not hearsay and may be used for cross-examination. These Rules of Evidence support an overriding policy in favor of cross examining a witness with a prior inconsistent statement as a fundamental legal principle governing trial practice and procedure that simply cannot be ignored.

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Also, this Court described the need for a party to expose prior inconsistent statements at trial by *bringing those statements into evidence*, rather than letting the witness tell a potentially fabricated story, leaving the cross-examiner with no recourse, *Ruhala,* 379 Mich at 128:

> When a cross-examiner on timely cross-examination [s]ucceeds in getting the witness to change his story, the integrity of the recantation is apparent, and [h]is original, recanted version no longer stands as substantive evidence. If the only evidence of an essential fact in a lawsuit were a statement made from the witness stand which the witness himself completely recanted and repudiated before he left the witness stand, no one would seriously urge that a jury question had been made out.

As *Ruhala* and *Dorsey* reflect, it is axiomatic that a deposition may be used at trial to impeach a witness. MCR 2.302(C)(7). Defendants' ability to impeach Mr. Baldwin was particularly critical here in light of the dubious factual foundation for Mr. Baldwin's valuation opinions, as set forth above. As noted above, when Defendants cross-examined Mr. Baldwin at his *de benne esse* deposition on May 20, 2013, he acknowledged that the centerpiece of his testimony – that the value of the materials allegedly destroyed in this case *could* be between $500,000.00 and $1,000,000.00 – was predicated on a Google search. (Ex. 6, p 7.) As he explained:

> Q. …[T]ell me … the calculation you used to come to … those figures.
>
> A. …Let me give you what it includes, okay? And everybody can Google it and see it [on] the internet because it's a very recent case of Kobe Bryant vs. his mother….
> ***
>
> …[T]he hypothetical answer … is right there for people to see and for people to make up their own minds. Kobe Bryant is an icon. Gordie Howe is an icon, as is Mark and Marty and the value that … they're arguing over is somewhere between $496,000 and well over a million dollars. (Ex. 6, pp 7-8.)

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Mr. Baldwin readily admitted that his valuation opinions were entirely hypothetical:

> Q. …[L]et's be clear about the numbers that you used in this case where you said that you believe the value could be $500,000 to over seven figures, what I want to know is the factual basis that you are relying upon to come to that calculation. How did you arrive at that number?
>
> A. There are no facts without actually knowing … what we're talking about here. … *So everything is hypothetical. Everything is hypothetical.* (Ex. 6, p 13.)

At trial, Mr. Baldwin opined that the materials allegedly destroyed by Defendants could be worth *a total of* $500,000 to $1,000,000. (6/14/13 trans, p 52.) He further testified that his opinion was based on factual evidence that Gordie Howe was specifically associated with the allegedly destroyed materials. (Id., pp 71, 82-83.) This put Mr. Baldwin's trial testimony directly at odds with his previous deposition testimony, wherein he testified he had no foundation basis to support any opinions regarding the value of any items allegedly destroyed in this case. (See Ex. 6, pp 9-10, 13.) When Defendants' counsel attempted to impeach Mr. Baldwin at trial (for the first time, of many times that were planned), with his prior deposition testimony, the lower court asked Defendants' counsel and Plaintiffs' counsel to approach, and made a ruling at a side bar that Mr. Baldwin's prior testimony could not be used at all at trial, even to impeach the witness. (6/14/13 trans, p 101.) Defendants' counsel twice referred Mr. Baldwin to his deposition transcript before the Court stopped the questioning (Id., p 100), leaving no doubt about what Defendants' counsel planned to use for impeachment.

While the details of this side bar were not fully articulated in the trial transcript, the sidebar exchange was captured by the trial court's audio/visual recording system. (Ex. 8, ¶¶ 15-20.) The recording confirms that Defendants' counsel "intended to impeach the witness, Howard Baldwin, with his prior inconsistent statements given at two prior depositions in this case." (Id.,

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¶ 17.) Judge Bowman "ruled that [Defendants' counsel] was not to ask any cross-examination questions of the witness based on the depositions, because the Court [had] previously ruled that the *de benne esse* deposition of Howard Baldwin was not to be played." (Id., ¶ 18.) Defendants' counsel "told the court that the questions and answers of Mr. Baldwin contained in the *de benne esse* deposition were the same exchange in another prior deposition in this case." (Id., ¶ 19.) Nonetheless, Judge Bowman "made it clear that [Defendants' counsel] was to ask no cross-examination questions of Mr. Baldwin based on prior inconsistent statements under oath." (Id., ¶ 21.) The trial court later acknowledged that it had prevented Defendants' counsel from impeaching Mr. Baldwin "because that deposition had been struck." (1/14/15 trans, p 6.)

The lower courts' handling of this issue was contrary to well established law that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975*, 478 Mich at 477 (Markman, J., dissenting). Undoubtedly, prior inconsistent statements are admissible to impeach the testimony of a witness. *Schratt v Fila*, 371 Mich 238, 244; 123 NW2d 780 (1963). See also *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997); *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Conversely, *disallowing* impeachment under such circumstances has repeatedly been held to constitute reversible error. See, for example, *Poore v State*, 501 NE 2d 1058, 1061 (Ind 1986) and *Daeda v State*, 841 So 2d 632 (Fla App 2003). These decisions reflect that the ability of a party to cross-examine a witness with a prior inconsistent statement is a fundamental trial tool. Trials are won or lost on the testimony of trial witnesses, especially expert witnesses. Therefore, having the ability to undermine the credibility of a trial witness, in particular expert witnesses, is the best way to demonstrate what weight should be given to a witness's testimony, if *any*. As Defendants argued below, in requesting a new trial on this basis:

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> Impeachment is a critical part of cross-examination, and the right to cross-examine a witness with prior inconsistent statements is so fundamental that our courts have held that it may be reversible error if a court foreclosed upon this right. Trials are truth seeking missions. As such, prejudicial impediments that stymy the search for the truth should be avoided. … For these reasons, this Honorable Court's ruling that Defendants could not impeach Mr. Baldwin at trial was extremely prejudicial. The fact that Defendants could not impeach Mr. Baldwin with his own testimony, and to establish that Mr. Baldwin had absolutely no factual basis for his unfounded opinions, resulted in a jury being allowed to guess on the sole issue to be tried, which was the issue of damages. (Ex. 13, pp 17-18.)

Citing *Grewe v Mount Clemens General Hospital*, 47 Mich App 111, 115; 209 NW2d 309 (1973) and *Cobb v Harris*, 47 Mich App 617, 619; 209 NW2d 741 (1973).

The prejudice to the defense cannot be overstated; Plaintiffs' sole expert and sole damages witness previously gave contradictory testimony under oath regarding the only issue that he was put before the jury to discuss (valuation of the supposedly lost property). The lower court – without any prompting from the Plaintiffs' counsel – interjected itself into the examination and prevented the jury from hearing it. The prejudicial effect of this is reflected in the size of the jury verdict. This Court now has an opportunity to send a message to trial courts throughout the state that cross-examination, specifically impeachment, is a bedrock of trial practice and should not be impeded absent extraordinary circumstances that were not present here.

The Court of Appeals' mischaracterization of Mr. Baldwin as a lay witness also tainted its analysis of this argument. The Court of Appeals simply held that the issue was unpreserved and that any error would have been harmless. (Ex. 1, *Power Play*, unpub op at 11 n 5.) For reasons explained above, Defendants did preserve this issue and the absence of a formal "offer of proof" should not have foreclosed a more substantive review by this Court. It was undisputed

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that during trial, Defendants sought to cross-examine Mr. Baldwin – who was either Plaintiffs' only proffered damages expert, or one of only a handful of proffered lay damages witnesses, in a trial that was only about damages – with a deposition transcript. (6/14/13 trans, pp 100-101.) Defense counsel's sworn account of the sidebar exchange (Ex. 8) confirmed that he "intended to impeach … [Mr.] Baldwin, with his prior inconsistent statements given at two prior depositions in this case." The lower court ruled that Defendants' counsel "was not to ask any cross-examination questions of the witness based on the depositions," because the *de benne esse* deposition of Mr. Baldwin had previously been stricken. (Id.) Defendants' counsel sought to clarify this, but the trial court "made it clear that [Defendants' counsel] was to ask no cross-examination questions of Mr. Baldwin based on prior inconsistent statements under oath." (Id.) Therefore, nothing in the record "implies that defense counsel was satisfied with the ruling made during the bench conference." (Ex. 1, *Power Play*, unpub op at 11.) To the contrary, at the post-judgment motion hearing (1/14/15 trans, p 4), Defendants' counsel complained that there were *two* deposition transcripts that he had been prevented from using for cross-examination. The trial court made no attempt to clarify its prior ruling. (Id., p 6.) At this hearing, Defendants' lead trial counsel protested *for a second time* (the first being in the Affidavit filed with the post-judgment motion) that he was denied use of *both of* Baldwin's depositions, and the trial judge made no effort to "correct" him.

Therefore, the record makes it abundantly clear that Defendants were precluded from cross-examining Mr. Baldwin with any of Mr. Baldwin's prior testimony; both the discovery deposition and the *de bene esse* deposition transcripts were precluded. Plaintiffs never articulated any legal basis for this result. Their sole argument in response to this argument was lack of preservation. (Ex. 12, pp 34-36.)

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Also, the particular testimony that Defendants' counsel sought to use for impeachment was, contrary to the Court of Appeals' finding (Ex. 1, *Power Play*, unpub op at 11), apparent from the context because it was already in the record, as it had been attached as an exhibit to Defendants' May 28, 2013 Emergency Motion in Limine. (Ex. 6; see also 1/14/15 trans, p 15.) Much of the testimony that Defendants sought to use at trial had also been attached to their February 27, 2013 "Motion for Summary Disposition on Want of Damages." (Ex. 11.) The Emergency Motion in Limine – which was attached to Defendants' Brief on Appeal and incorporated by reference – did in fact specify the particular testimony that Defendants sought to use to impeach Mr. Baldwin. (See Ex. 6.) All of this confirms that the Court of Appeals simply took the easy way out when it declared the cross-examination issue unpreserved.

Critically, neither the Plaintiffs, nor the trial court, nor the Court of Appeals have identified any substantive reason why Defendants shouldn't have been allowed to cross-examine Mr. Baldwin with his discovery deposition testimony. And while the *de bene esse* transcript had been stricken as substantive evidence, it is (as noted above) well established that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975*, 478 Mich at 477 (Markman, J., dissenting), citing *U.S. v Havens*, 446 US 620; 100 S Ct 1912 (1980). Conversely, not allowing impeachment under such circumstances has been held to constitute reversible error. See *Daeda*, 841 So 2d at 632; *Poore v State*, 501 NE 2d at 1061. These decisions reflect that the ability of a party to cross examine a witness with a prior inconsistent statement is a fundamental trial tool. Therefore, in light of the standard stated above, any error in this regard could not have been harmless.

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III. Plaintiffs were not entitled to attorney fees under the Settlement Agreement, where such fees were an element of their alleged breach of contract damages, and Plaintiffs failed to proffer evidence of attorney fees at trial.

As noted above, "with respect to an award of attorney fees, we review underlying findings of fact for clear error, … while questions of law are reviewed *de novo*…." *In re Temple Marital Trust*, 278 Mich App at 128. "But we review the court's decision whether to award attorney fees and the determination of the reasonableness of the fees for an abuse of discretion." *Id.* However, "[w]hether a party is entitled to attorney fees and costs pursuant to a contract is a question of law that we review *de novo*." (Ex. 10, *T-Craft,* unpub op at 3.) Defendants briefed this issue in their July 8, 2013 Response to Plaintiff's Motion for Entry of Judgment, and also asserted these arguments at the hearing of that motion. (See 7/10/13 trans, p 7, 9-11.)

Pursuant to the general Michigan rule, attorney fees are not recoverable as an element of costs or damages absent an express legal exception. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). As Plaintiffs noted below, there are four exceptions to the general American Rule that attorney fees are not recoverable. Specifically, those situations include when attorney fees are expressly provided for by statute, court rule, common-law or contract.

Here, Plaintiffs moved for attorney fees as set forth in the Settlement Agreement. However, attorney fees awarded under contractual provisions are considered damages, not "costs." *Central Transp,* 139 Mich App at 548. As such, Plaintiffs were required to plead the attorney fees in the Complaint *and introduce evidence at trial* to support their contract claim. (Ex. 10, *T-Craft,* unpub op at 3.) Stated differently, a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a *prima facie* case and avoid a directed verdict. *Id.*, citing *Zeeland Farm Services,* 219 Mich App at 196.

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In *T-Craft*, the Court of Appeals addressed a fact pattern nearly identical to the facts in this case and ruled that the plaintiffs *were not* entitled to contractual attorney fees based on their failure to introduce any evidence at trial to support such a claim. (Ex. 10, *T-Craft*, unpub op at 3.) Although Defendants discussed it extensively in their Court of Appeals briefs, the panel inexplicably refused to even mention it. (Ex. 1, *Power Play*, unpub op at 13.) While the panel was correct in noting that *T-Craft* was "not precedentially binding" (Id. at 13 n 6), its factual and procedural similarity to this case, coupled with the dearth of other controlling authority, made consideration of the *T-Craft* opinion warranted under MCR 7.215(C)(1) as amended effective May 1, 2016.

In *T-Craft*, the panel noted that "[a]ttorney fees awarded under a contractual provision that entitles a prevailing party to recover its attorney fees are considered general damages rather than taxable costs." (Ex. 10, *T-Craft*, unpub op at 3.) For this reason, "a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and avoid a directed verdict." (Id.) Because the *T-Craft* plaintiffs did not present "evidence at trial to support their request for contractual attorney fees," the trial court properly denied their "post-judgment motion for attorney fees." (Id.)

Similar to the plaintiffs in *T-Craft*, the Plaintiffs here neither asserted, nor presented any evidence at trial to support, their request for attorney fees based on the subject contract. Simply put, Plaintiffs never introduced any evidence at trial to support a *prima facie* case for attorney fees as an element of their claim for breach of contract.

Additionally, the Court of Appeals reached a result that cannot be reconciled with *Pransky v Falcon Group, Inc*, 311 Mich App 164; 874 NW2d 367 (2015). *Pransky*, 311 Mich at

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194-195 states that in "order to obtain an award of attorney fees as damages under a contractual provision … the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term." Unlike "statutorily permitted or rules-based attorney's fees, contractually based attorney's fees form part of the damages claim. …. That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party." *Id.* *Pransky,* 311 Mich at 194-195 held that "because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract. … A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding."

Therefore, the September 11, 2014 Opinion and Order, which awarded $80,765.00 in attorney fees to the Plaintiffs, must be vacated and – if this Court does not find reversible error in either Argument I or Argument II above – the Judgment must be reduced accordingly.

RELIEF SOUGHT

The trial court made numerous pre-trial rulings which, although contested vigorously in the Court of Appeals, are beyond the scope of this Application. The end result of those rulings limited Defendants to contesting damages only in a case that rested entirely upon inferences stacked upon innuendoes and the pseudo-celebrity status of Plaintiff's "expert," Mr. Baldwin. While Defendants are not seeking leave to appeal from those rulings (granting summary disposition to the Plaintiffs on liability and denying Defendants summary disposition based on the lack of non-speculative damages proofs), a recitation of them is provided in the Statement of Facts in order to establish context, and to demonstrate how allowing Mr. Baldwin to offer expert testimony, and denying Defendants the opportunity to impeach him with his prior testimony,

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could not have possibly been "harmless" as the Court of Appeals concluded. Moreover, the trial court's rulings in these respects were erroneous, and jurisprudentially significant, for reasons explained above. These errors were compounded when the Court of Appeals took the path of least resistance, re-framing Mr. Baldwin as a "lay" witness, finding the impeachment issue unpreserved, and declaring any error in either respect "harmless." In short, there was no meaningful appellate review of these rulings.

The trial court made perhaps its most perplexing ruling when it denied Defendants the ability to impeach Mr. Baldwin with his deposition testimony. No explanation was offered and the ruling was shrouded under the veil of a sidebar. When Defendants moved for a new trial on this basis, the lower court offered no explanation except to say that the "deposition had been struck." (1/14/15 trans, p 6.) But this was not a legally sufficient explanation; it is well established that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975,* 478 Mich at 477 (Markman, J., dissenting). The Court of Appeals avoided dealing with the substance of this issue by adopting Plaintiffs' argument that it was not preserved. For reasons explained above, this is simply not true. Apart from the issue preservation argument (and the Court of Appeals' superficial invocation of harmless error), neither the Plaintiffs, nor the trial court, nor the Court of Appeals have ever identified any *substantive r*eason why Defendants shouldn't have been allowed to cross-examine Mr. Baldwin with his discovery deposition testimony. And while the *de bene esse* transcript had been stricken as substantive evidence, it is (as noted above) well established that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975,* 478 Mich at 477 (Markman, J., dissenting). The lower court – without any prompting from the Plaintiffs' counsel

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– interjected itself into the examination and prevented the jury from hearing it. This error alone entitles Defendants to a new trial.

Additionally, the post-judgment award of attorney fees was erroneous as a matter of law for reasons explained above, and warrants review under MCR 7.305(B)(5)(b). For these reasons, Defendants-Appellants Del Reddy, Aaron Howard, Michael Reddy and Immortal Investments, L.L.C. respectfully request that this Honorable Court: (1) remand for a new trial with instructions (relative to the issues regarding Mr. Baldwin) or in the alternative, (2) remand for entry of a new judgment to account for the erroneous award of post-judgment attorney fees.

SECREST WARDLE

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INDEX OF EXHIBITS